IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-175

STATE OF LOUISIANA,

Petitioner,

versus

FLOYD FALKINS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES (Continued)

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OPINIONS BELOW

The majority and the dissenting opinions of the Louisiana Supreme Court are set forth in the Appendix to this Petition.

JURISDICTION

The judgment of the Louisiana Supreme Court, setting aside the armed bank robbery conviction of Floyd Falkins was rendered on March 6, 1978. The State's application for rehearing was denied on April 6, 1978. The State respectfully asks that it be allowed to file

this petition out of time in view of the importance of the issues involved. This Court has authority to review the judgment in question by writ of certiorari under the provisions of 28 U.S.C. § 1257 (3).

QUESTIONS FOR REVIEW

Whether the Louisiana Supreme Court misconstrued the decision of this Court in *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976), in the following particulars: 1) in finding that prior to trial defense counsel made a specific request for favorable information; 2) in holding that said information could have raised a reasonable doubt in a jury's mind; 3) in failing to consider the entire record in determining whether the undisclosed evidence created a reasonable doubt of the defendant's guilt; and 4) in holding that the information — misidentifications by two of five State eyewitnesses — was sufficiently material to warrant reversal due to nondisclosure, despite the holding in *Garrison v. Maggio*, 540 F.2d 1271 (5th Cir. 1976), that the nondisclosure of such impeachment evidence should "seldom, if ever," lead to reversal.

CONSTITUTIONAL PROVISIONS INVOLVED

As in *Agurs*, the constitutional provisions involved herein are the "due process" clauses of the Fifth and Fourteenth Amendments, as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment V

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment XIV Section 1

STATEMENT OF THE CASE

The majority opinion of the Louisiana Supreme Court does not state the facts with complete accuracy. Therefore, the following statement of facts is offered:

Floyd Falkins and two co-defendants were charged with violating Louisiana Revised Statute 14:64 (armed robbery) in a bill of information filed in the Criminal District Court for the Parish of Orleans on April 26, 1976.

The charges against the two co-defendants were nolle prosequied. One, Earl Wallace, pled guilty in the United States District Court for the Eastern District of Louisiana to a charge of bank robbery arising from the same incident. The other, Jessie Lepree, testified on behalf of the State in another case in which he was charged with armed robbery. In exchange for his testimony, the charges herein were dismissed and he was allowed to plead guilty to a lesser offense in the other case.

Falkins was tried before a jury on September 8, 1976, and found guilty as charged. He was sentenced on October 18, 1978, to serve thirty (30) years at hard labor. The trial judge indicated that the harsh sentence was imposed because a teller had been shot during the robbery, although it is conceded that Falkins did not inflict the wound.

After the trial, Falkins retained new counsel who filed a motion for new trial alleging that the prosecution has withheld favorable evidence from the defense.

At the hearing on the motion for new trial, it developed that the "favorable evidence" showed only that two of the five eyewitnesses who testified on behalf of the State *may* have made mistaken identifications on the day of the offense.

More particularly, the new trial evidence revealed that after the robbery, F.B.I. agents returned to the scene with two suspects, Larry Durosseau and Leonard Johnson. It was later determined that neither man was involved in the robbery.

A statement taken by the F.B.I. agents from Mrs. Peggy Ralph, one of the eyewitnesses, was introduced at the motion for new trial hearing. See Appendix. It indicated that she had identified either Durosseau or Johnson as one of the robbers. The statement did not reveal, however, whether Mrs. Ralph had ascribed to Durosseau or Johnson any particular role in the robbery or any particular disguise.

A similar F.B.I. statement was introduced to show that Edgar Williams had identified Durosseau as the robber playing the role he ascribed to Falkins when he testified at trial.

The defense called neither Mrs. Ralph nor Mr. Williams as witnesses at the motion for new trial hearing; nor were the investigating F.B.I. officers called.

Mr. Ernest Chen, the United States Attorney who prosecuted the bank robbery charges against Wallace, was called, however. He testified that he had made his file, which included the Williams and Ralph statements, available to the State prosecutrix prior to trial. The Louisiana Supreme Court found that the prosecutrix probably was aware of these statements prior to trial; although the majority opinion concedes that this conclusion may not be entirely sound.

In connection with Mr. Chen's testimony, the entire United States Attorney's file was introduced into evidence. Pertinently, it included two confessions made by Earl Wallace. These confessions named Falkins as one of the perpetrators of the robbery. See Appendix.

Also introduced at the motion for new trial hearing was the affidavit of Henry Mitchell, respondent's trial attorney. See Appendix. According to this affidavit, which was prepared several months after the trial, Mr. Mitchell asked the prosecutrix ". . . . if any individuals were identified by the bank personnel subsequent to the robbery;" at some time prior to the trial. Mr. Mitchell filed no written discovery motions, however.

The attorney for the State, Miss Sheila Myers, testified that she recalled that Mitchell had asked only whether anyone had identified Falkins. She also said that Mitchell might have asked if anyone else had been identified, but that she understood Mitchell's inquiries to refer only to formal lineup identifications in either case.

The motion for new trial was denied, and the matter was appealed to the Louisiana Supreme Court.

Neither side argued in brief that there had been a specific request for the on-the-scene identifications. Rather, it was conceded by respondent, Falkins, that the *Agurs* "reasonable doubt" standard applied as if there had been only a general request for favorable evidence. Therefore, the briefs for both the State and the defense addressed themselves solely to that point.

The Louisiana Supreme Court, however, found that there had been a specific request. Nevertheless, it applied the *Agurs* "reasonable doubt" standard. The majority held that Falkins' conviction should be reversed under this standard because the undisclosed "misidentifications" could have created a reasonable doubt in the jury's mind. No mention was made in the majority opinion of the Wallace confessions or of his guilty plea.

ARGUMENT

In the respectful opinion of the State of Louisiana, review should be granted herein because, as will be shown, the Louisiana Supreme Court has decided a substantial due process question in a matter which is not in accord with this Court's decision in *United States v. Agurs*, supra.

1. Lack Of A Specific Request For The "Misidentifications."

Although the State respectfully believes that the Louisiana Supreme Court erred as a matter of law in holding that a specific request for the "misidentifications" was made herein, it is not necessary to resolve that issue for the following reasons:

First, the Louisiana Supreme Court ultimately applied the "reasonable doubt" standard which, according to *Agurs*, attains only when there is merely a general request for favorable evidence or when there is no request at all.

Moreover, the court offered no explanation for this inconsistency. The majority opinion, however, clearly shows that the record is insufficient to support a conclusive determination that a specific request was made; stating that there was a mere preponderance of evidence to that effect.

Next, as noted above, respondent did not argue on appeal that there had been a specific request, as the term is defined in *Agurs*. Instead, respondent conceded that the *Agurs* "reasonable doubt" standard applied and argued that under that standard his conviction should be reversed.

Accordingly, it is respectfully suggested that the Louisiana Supreme Court holding that there was a specific request herein may be disregarded as surplusage. The holding was inconsistent with the court's ultimate application of the *Agurs* "reasonable doubt" standard and, further, was unnecessary to the court's decision in view of the brief filed by Falkins. Moreover, the majority opinion admits that this conclusion was reached only with great difficulty.

Alternatively, it is respectfully submitted that the Louisiana Supreme Court erred as a matter of law in making this determination.

Agurs, supra, cites this Court's decision in *Brady v. Maryland*, 270 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), as a case involving a specific request for favorable information. It is instructive to note, therefore, that defense counsel in *Brady* specifically requested the extrajudicial statements made by Brady's accomplice.

Furthermore, the *Agurs* decision defines a specific request as one which gives the prosecutor notice of exactly what is required.

Measured against these standards, it is obvious that there was no specific request herein.

Accepting as true the uncross examined affidavit of Mr. Mitchell, he simply asked for all subsequent identifications by bank personnel. Such a request is not as specific as the request made in *Brady*. Nor does it give notice of exactly what is required.

Likewise, if Miss Myers' testimony is believed, Mr. Mitchell's request referred only to formal lineup identifications or identifications of Falkins.

Clearly, under neither version does the request amount to a specific request for on-the-scene identifications.

Accordingly, it is respectfully submitted that the Louisiana Supreme Court's holding that there was a specific request for the "mistaken identifications" should be disregarded. Alternatively, it is submitted that the holding was not in accord with the *Agurs* decision.

2. The Impact Of The Undisclosed Evidence Should Not Have Been Measured On The Jury's Mind.

The Louisiana Supreme Court also erred in attempting to measure the impact of the omitted evidence on the mind of the jury.

The majority's focus on the effect the evidence might have had on the mind of the jury is clearly out of harmony with this Court's emphatic rejection of such a "sporting theory of justice" in *Agurs*, supra, 96 S.Ct. at 2399-2401.

It is also inconsistent with the practice of the vast majority of federal appellate courts. See *United States ex rel. Moore v. Brierton*, 560 F.2d 288 (7th Cir. 1977); *Cannon v. Alabama*, 558 F.2d 1211 at 1216 (5th Cir. 1977); *United States v. Beasley*, 550 F. 261 (5th Cir. 1977); *United States v. Lasky*, 548 F.2d 835 (9th Cir. 1977); *United States v. Orzechowski*, 547 F.2d 978 (7th Cir. 1977); *United States v. Van Maanen*, 547 F.2d 50 (8th Cir. 1976); *United States v. Erb*, 543 F.2d 438 (2nd Cir. 1976), cert. denied 97 S.Ct. 493; *Garrison v. Maggio*, 540 F.2d 1271 (5th Cir. 1976); and *United States v. Jackson*, 536 F.2d 628 (5th Cir. 1976). But see *White v. Maggio*, 556 F.2d 1352 (5th Cir. 1977), *Norris v. Slayton*, 540 F.2d 1241 (4th Cir. 1976), and *United States v. Morell*, 524 F.2d 550 (2nd Cir. 1975).

As *Agurs*, supra, has been interpreted and applied, the impact of the omitted evidence should have been measured on the mind of the reviewing court. Alternatively, the case should have been remanded for a determination by the trial judge.

Hence, it is respectfully submitted that the Louisiana Supreme Court erred in attempting to measure the impact of the omitted evidence on the mind of a hypothetical jury.

3. The Louisiana Supreme Court Failed To Consider The Entire Record.

In attempting to determine whether the omitted evidence would have created a reasonable doubt in the mind of the jury, the Louisiana Supreme Court considered only the evidence adduced at the trial and some of the evidence introduced at the hearing on the motion for new trial. The majority opinion makes no mention of the confessions or the guilty plea of Earl Wallace, one of the co-perpetrators. Thus, it must be assumed that the court did not consider these matters in determining whether there was a reasonable doubt of respondent's guilt.

The Louisiana Supreme Court committed plain error in this regard since the *Agurs* decision makes it perfectly clear that the question of whether omitted evidence creates a reasonable doubt must be answered in the light of the entire record. Since this evidence was part of the record by virtue of its introduction during the hearing at the motion for new trial, it should have been considered by the court. The court's failure even to mention this evidence is unaccounted for. More importantly, it is grossly prejudicial to the State of Louisiana since it may fairly be said that this evidence proves the respondent's guilt beyond a shadow of a doubt.

4. The Impeaching Effect Of The Mistaken Identifications Was Not Sufficiently Material To Warrant Reversal

The obvious import of the *Agurs* decision is that undisclosed evidence must strongly indicate the in-

nocence of the accused in order to require reversal of a conviction. As set forth in the dissents recorded in the Louisiana Supreme Court, "mistaken identifications" by two of five eyewitnesses are not of that calibre.

Evidence of prior mis-identifications is, at best, useful only for purposes of impeachment. Although some impeachment evidence may occasionally be sufficiently material to warrant reversal under *Agurs*, the Fifth Circuit has held that impeachment evidence of the sort involved herein will "seldom, if ever" reach the *Agurs* standard of materiality. *Garrison v. Maggio*, supra. *Garrison*, it should be noted, involved inconsistent descriptions of the perpetrators of a robbery by the State's only eyewitness, whose testimony constituted the bulk of the State's case.

Moreover, contrary to the Louisiana Supreme Court majority opinion, there is no evidence that Mrs. Ralph had Durosseau or Johnson confused with Falkins, rather than with Wallace or Lepree. Her statement, pertinently, is as follows: "[a]pproximately 45 minutes after the robbery, I saw one of the robbers again. He was sitting in the back of an unmarked police car. The officers took him out of the car and I saw him clearly. I am positive that he was one of the robbers." It contains no evidence indicating that the person she saw was dressed in the peculiar manner or took the actions she ascribed to Falkins at trial.

If, therefore, Mrs. Ralph had the man she identified at the scene confused with Wallace or Lepree, but not with Falkins, the impeaching effect of her prior identification would have been minimal at Falkins' trial.

It should also be noted that further impeachment of Edgar Williams by proof of his mis-identification would not have aided respondent's cause greatly. Williams' testimony concerning Falkins' disguise and his activities during the robbery was contradicted by all of the other State's witnesses. Thus, use of his prior mis-identification could only have impeached his already shaky credibility but a little further.

It should be noted, too, that these witnesses resided in the New Orleans area at the time of the hearing on the motion for new trial and could easily have been subpoenaed by respondent. They were not, however, so the logical inference is that their testimony would not have been helpful to the defense.

Finally, in holding that evidence of Mrs. Ralph's and Mr. Williams' prior identifications (and, as shown above, Mrs. Ralph's prior identification cannot be properly characterized as "mistaken" as to Falkins) might have produced a different jury verdict, the Louisiana Supreme Court apparently assigned no probative value to the testimony of the other eyewitnesses. This, of course, was erroneous; especially when it is remembered that the testimony of Mrs. Venturella was un-impeached and entirely consistent. The error is all the more egregious in light of the Wallace confessions and his guilty plea.

CONCLUSION

For the foregoing reasons, the State of Louisiana respectfully prays that a Writ of Certiorari issue

herein directed to the Louisiana Supreme Court; and that after due consideration the judgment of the Louisiana Supreme Court erroneously interpreting *United States v. Agurs* and reversing the conviction of Floyd Falkins be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application For Writ Of Certiorari has been served upon respondent by placing a copy of same in the United States Mail, postage prepaid, addressed to:

Paul Billingsley, Esq.
1300 Hibernia Bank Building
New Orleans, Louisiana 70112

Attorney for Floyd Falkins,
Respondent.

New Orleans, Louisiana, this
____ day of July, 1978.

APPENDIX

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA,

Appellee

versus No. 60,628

FLOYD FALKINS,

Appellant

Appeal from the Criminal District Court for the Parish of Orleans; Honorable Charles R. Ward, District Judge, Presiding.

TATE, Justice.

The defendant Falkins was convicted of armed robbery, La. R.S. 14:64, and sentenced to imprisonment at hard labor for thirty years.

His appeal presents five assignments of error. Of these, Assignments 1 and 2 raise a substantial issue of reversible error. They concern the failure of the state's prosecutrix to reveal, upon request, information of an exculpatory nature — that two of the state's eyewitnesses had, on the day of the robbery, made mistaken identifications of a person as the robber who was not actually involved in or present at it.

Factual Context

Three men robbed a teller at a bank in December, 1975. Falkins was arrested some five months later, primarily based upon the claim of one of the admitted robbers that Falkins was a co-participant. (At the trial, Falkins testified, claiming innocence; he ascribed the robber's identification of him as arising from a grudge in connection with a narcotics disagreement between them.)

Falkins' conviction is based solely upon eyewitness identification made, after his arrest, by bank employees and a customer present during the robbery. Neither the weapon or costumes used in the robbery, nor any of its proceeds, were discovered or connected with him. The bank was equipped with cameras, but the film did not include any image of the accused during the robbery. Tr. 64.

Specific Pre-Trial Request as to Identification Evidence

Assignments 1 and 2 relate to the denial of a new trial, despite a showing that exculpatory identification evidence had been withheld from the defense, and that the defendant had made specific pre-trial inquiry of the prosecutor as to the existence of such subject-matter information.

On the motion for new trial, after appointment of new counsel, an evidentiary hearing developed the following facts:

On the day of the bank robbery, the FBI arrested several suspects and brought them to the bank. Two of the eyewitnesses to the robbery positively identified one Durosseau as one of the robbers. It is conceded that their initial identification was mistaken.

The United States Attorney's office made this information available to the state assistant district attorney in charge of the prosecution. Although this prosecutrix' recollection was unclear, the positive testimony of the federal attorney, together with her own admissions, make it virtually indisputable that she was specifically informed that two eyewitnesses had made a mistaken identification of a robber on the day of the robbery.

In the state prosecution, prior to trial, the appointed defense attorney requested of the prosecutrix information as to whether any individuals were identified by the bank personnel subsequent to the robbery. Upon receiving information from the prosecutrix that no such identifications were made, the defense attorney did not file a *Brady* motion requesting revelation of exculpatory information.

Again, the recollection of the prosecutrix is unclear as to this incident. However, she further testified that, if formally ordered to reveal exculpatory information at the time, she would not have felt obliged to reveal this initial misidentification. Her reason was that the misidentification of *one* of the three robbers is not necessarily exculpatory of the accused himself.

For the present purposes, we will accept the record as preponderantly showing that, despite a specific re-

quest of the defense attorney as to the existence of such identification evidence, the prosecutrix did not reveal that two of the state's eyewitnesses had earlier misidentified one of the robbers.

The trial court itself apparently so concluded, in resting its denial of the new trial upon the reason that the defendant had not, by formal *Brady* motion instead of informal request, asked for this exculpatory evidence.

Undoubtedly, a formal motion might preserve the request better than the recollections of the attorneys at a subsequent time. Nevertheless, considering the affirmative duty of the prosecutor to disclose exculpatory evidence in some instances even without request,[1] we do not believe that the constitutional right to obtain exculpatory information of a specified nature upon specific request, United States v. Agurs, ___ U.S. ___, 96 S.Ct. 2392 (1976), State v. May, 339 So.2d 764 (La. 1976), is waived by lawyer-to-lawyer request, which relies for disclosure upon the traditional professional responsibility and honorable candor of the legal profession, instead of by making a formal motion to the court for it.

1 The prosecution is obliged to make available to the accused's counsel evidence that it has obtained which is clearly supportive of the accused's innocence, even in the absence of any defense request for it. United States v. Agurs, cited in text below, at 96 S.Ct. 2399. As will be seen, as developed at the trial, the two eyewitnesses had affirmatively identified as another person the robber they now identified as the defendant. At the time of nondisclosure, however, the state (not having the benefit of the full trial testimony) did not so realize. The non-disclosure in this instance indicates the wisdom of liberal rather than guarded disclosure, in order to avoid post-conviction reversal for nondisclosure of what turns out to be truly exculpatory.

Legal Principles Applicable

Unquestionably, upon specific request concerning the existence of exculpatory identification testimony, the prosecutrix was in error in failing to disclose it, especially since the state's whole case depended on eyewitness identification. State v. May, 339 So.2d 764 (La. 1976).

As we there stated, 339 So.2d 770, quoting from *Agurs* at 96 S.Ct. 2399: " '* * * Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.' "

Upon formal request, the trial court should and presumably would have ordered the state to furnish information of the misidentification immediately following the robbery.

The issue before us, however, is not only whether the state upon request should have disclosed the misidentification testimony (it should have); but, in addition, whether the state's failure to disclose it is error requiring reversal.

As to the latter issue, reversibility is essentially determined by whether the "nondisclosure deprived

the defendant of his right to due process . . . [i.e.] of a fair trial," *Agurs*, 96 S.Ct. 2399. Whether the evidence withheld is so constitutionally material as to require reversal is determined by an "inevitably imprecise standard" in the light of the "entire record." Id.[2]

In *Agurs*, the United States Supreme Court summarized the constitutional test of reversibility because of nondisclosure in these terms, 96 S.Ct. 2401-02:

"The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that [in a post-trial hearing by the court] if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is not justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

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2 *Agurs*, 96 S.Ct. 2399: "Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure."

Reversible Error Shown

Examining the record as a whole, we find that the initial misidentification of the robber by two state eyewitnesses was so material that its nondisclosure, especially upon request, deprived the defendant of a fair trial.

As earlier stated, the sole basis of the state's conviction is the eyewitness identification of the accused as one of the three robbers. These five eyewitnesses had never seen the accused before, had mostly glimpsed but briefly the robber they identified as the accused in the episode of five minutes or so, and did not have the opportunity to view the defendant himself until some five months after the robbery.

Were the identifications strong and positive, nondisclosure may not have required reversal. Here, however, as a summary of the facts will show, failure to disclose to the accused the earlier misidentification by two of the state's eyewitnesses, for purposes of cross-examination as to the credibility of their trial identification testimony, had the effect of omitting evidence which "in the context of the entire record create(s) a reasonable doubt as to the defendant's guilt." State v. May, cited above, at 339 So.2d 771.

The robbery occurred as follows:

Three black men entered the bank. One of them stood at the door, maintaining a lookout and holding a gun on bank employees made to lie on the floor. One jumped over the teller's bench and forced a teller to

give her some cash and to search for more, striking her with a gun in the process. The third (identified as the accused by three of the witnesses) stood with a bag in the center of the room.

This third robber was dressed in woman's clothes, with a wig. He was not masked, as were the other two robbers. *His* face *alone* was seen by the witnesses.

On the day of the robbery, FBI agents brought one Durosseau to the bank as a suspect. Two of the state's five eyewitnesses positively identified Durosseau as the robber. These two witnesses were the security guard (Williams) and a bank customer (Mrs. Peggy Ralph).

In the context of the record, he was so identified on the basis of the facial similarity of Durosseau to the robber, just as on the same basis (see below) the present defendant was so identified. The failure to disclose this misidentification becomes material in the light of the evidence as a whole.

The testimony of the five eyewitnesses may be evaluated as follows:

(1) The bank guard (Williams), alone of the witnesses, identified the accused as the robber who stood guard at the door. (The other witnesses identified him as the man in woman's clothes.) He was firm in his identification. Under cross-examination, he testified positively as to his "good memory" of the incident, Tr. 47, and that there was "no doubt in my mind," Tr. 45. (It

is to be remembered that on the day of the robbery he had mistakenly identified Durosseau with the same certainty.)

(2) The customer (Mrs. Ralph) was likewise positive that the man without a mask in woman's clothes was the defendant. Tr. 53. However, in her earlier identification on the day of the robbery, she had with equal certitude identified Durosseau as the unmasked robber.

In both of these instances, the earlier positive misidentification was of another person than the defendant, who was now at the trial identified by them as the robber whose face they had previously misidentified as Durosseau's. This strong circumstance indicating possible error in their present trial identification is one which, brought to the jury's attention, might well have raised reasonable doubts as to the accuracy of their identification of the accused.

In addition, however, other circumstances indicate the weakness of the identification testimony as a whole. It is in this context that the earlier misidentification becomes so material that its nondisclosure amounts to reversible error:

(3) The cashier (Ms. Lebeaud) was struck by and largely preoccupied with another of the robbers. She recognized the accused at the lineup some months later by "the features in the face," including his "high cheek bones." However, she also testified that, immediately following the robbery, she had described the woman-clothed man (whom she now identified as the

accused) as being between 5'4" and 5'7" in height; whereas, in fact, the woman-clothed man was "the tallest one," Tr. 46, stated in brief to be six feet tall.[3]

(4) The bank manager (Nogess) had identified the accused as a robber "by facial structure" at the lineup held four months or so after the robbery. At the trial, he identified the accused as the man he had identified at the lineup, but he admitted he wasn't "sure" the defendant was the man and that he did not get "that good a look at any one of the individuals." Tr. 40.

(5) The last of the five witnesses, the receptionist (Mrs. Venturells), did positively identify the accused as the unmasked robber in woman's clothes.

In summary, however, the record discloses weaknesses and uncertainties in the identifications made by two of the state's five witnesses. Thus, the misidentification by two others on the day of the robbery, if brought to the attention of the trial jury, was sufficiently material as to have raised reasonable doubt in the jury's mind, both as to the witness' own positive trial identification and also as to the strength of the state's case (i.e., since the identification of the accused by four out of five of the state's eyewitnesses is shown to be open to doubt).

Upon this showing, the constitutional test for reversibility has been met; for, as *Agurs* states, "the omitted evidence creates a reasonable doubt that did not otherwise exist." 96 S.Ct. 2401.

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3 The record indicates that one of the *other* robbers was 5'11" in height. Tr. 46.

We are thus unable to agree with the persuasive and forceful arguments presented by the state's appellate brief that the nondisclosure is not reversible, because it concerned only matters marginally useful for purposes of impeachment. See, e.g., State v. Owen, 338 So.2d 645 (La. 1976) and Garrison v. Maggio, 540 F.2d 1271 (CA 5, 1976), relied upon by the state.

Decree

For the reasons stated, therefore, we find that the defendant was denied a fair trial by the nondisclosure, upon request, of material evidence casting doubt upon his guilt. We reverse the conviction and sentence, and we remand for a new trial.

REVERSED AND REMANDED.

SANDERS, C.J., dissents with written reasons.

SUMMERS, J., dissents.

MARCUS, J., dissents and assigns reasons.

SANDERS, Chief Justice (dissenting).

In the present case, three men robbed a New Orleans bank. On the day of the robbery, the F.B.I. brought several suspects to the bank for possible identification. Two of the five eyewitnesses misidentified one of them as one of the robbers. The Assistant District Attorney made no disclosure of this information to the defense prior to trial. The majority reverses the conviction. I disagree.

As noted by the majority, the controlling decision is United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Under that decision, the test of reversibility is whether or not the undisclosed evidence creates a "reasonable doubt that did not otherwise exist." If there is only the "mere possibility" that the undisclosed information might have produced a contrary verdict, reversal is not required. State v. Owens, La., 338 So.2d 645 (1976).

In my opinion, the misidentification of one of the three participants on the day of the robbery is insufficient in the light of the entire record to raise a reasonable doubt as to this defendant that did not otherwise exist. See State v. Clark, La., 352 So.2d 223 (1977); State v. Cass, La., ___ So.2d ___ (No. 60,468, December 19, 1977); State v. Williams, La., 349 So.2d 286 (1977).

For the reasons assigned, I respectfully dissent.

MARCUS, Justice (dissenting)

I do not consider that the failure to disclose the initial misidentification of *one* of the three robbers by two of the five eyewitnesses, for purposes of cross-examination, was so material that it deprived defendant of a fair trial. Evaluated in the context of the entire record, I do not believe that the omitted evidence creates a reasonable doubt that did not otherwise exist. Hence, no constitutional error was committed. I find no justification for reversal of the conviction and sentence and remand for a new trial. Accordingly, I respectfully dissent.

SUPREME COURT
OF LOUISIANA
A True Copy
JUL. 13, 1978
/s/ ANDREW J. FALCON
DEPUTY CLERK

OFFICE OF THE CLERK
SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

UNITED STATES OF AMERICA

STATE OF LOUISIANA

SUPREME COURT OF THE STATE OF LOUISIANA

New Orleans, 70112

I, Andrew J. Falcon, Deputy Clerk, Supreme Court of the State of Louisiana, do hereby certify that the Court took the following action on April 6, 1978, in the matter entitled

STATE OF LOUISIANA

versus

FLOYD FALKINS

REHEARING REFUSED

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this the 13th day of July A. D., 1978.

/s/ ANDREW J. FALCON
Deputy Clerk
Supreme Court of
the State of
Louisiana

FEDERAL BUREAU OF INVESTIGATION

10577202391

Date of transcription 12/10/75

PEGGY RALPH, 4850 Brittany Court, New Orleans, Louisiana, furnished the following signed statement:

"December 4, 1975
"New Orleans, La.

"I, Peggy Ralph, 4850 Brittany Court, New Orleans, Louisiana, hereby make the following free and voluntary statement to Francis E. Carey III, who has identified himself to me as a Special Agent of the Federal Bureau of Investigation.

"On December 4, 1975 I witnessed part of a robbery of the Liberty Bank and Trust Co., 3002 Gentilly Blvd., New Orleans, La. I saw two men going into the bank and I saw some of the people in the bank getting down on the floor. I also heard what sounded like a car backfiring. A few minutes later I saw the same two men, accompanied by what looked like a woman, walk across the bank parking lot, and then run down the street near the bank.

"Approximately forty minutes after the robbery, I saw one of the robbers again. He was sitting in the back of an unmarked police car. The officer took him out of the car and I saw him clearly. I am positive that he was one of the robbers.

"I have read this statement and it is true & correct.

"/s/ Mrs. Peggy W. Ralph

"Witness:
/s/ Francis E. Carey III, Special Agent, Federal Bureau of Investigation, New Orleans, La. 12/4/75"

Interviewed on 12/4/75 at New Orleans, Louisiana. File NO 91-7204 by SA FRANCIS E. CAREY, III:dbr. Date dictated 12/4/75

SUPREME COURT OF LOUISIANA
A True Copy
JUL. 13, 1978
/s/ ANDREW J. FALCON
DEPUTY CLERK

FEDERAL BUREAU OF INVESTIGATION

11677221635

Date of transcription 4/5/76

EARL C. WALLACE, while located at the New Orleans Office of the FBI, 701 Loyola Avenue, furnished the following signed statement:

"New Orleans, Louisiana
"April 1, 1976

"I, Earl Charles Wallace, do hereby make the following voluntary statement to Charles W. Draper and James Allen Roberts who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. I have been advised of my rights and have read a form which explains my rights. I understand my rights fully and have signed the form. No threats or promises have been made to me.

"I was born January 17, 1955, and I can read and write the English language.

"On December 4, 1975, I participated in the robbery of the Liberty Bank and Trust Company, 3002 Gentilly Boulevard, New Orleans, Louisiana. Floyd Falkins and Jesse Lapree participated with me in this robbery. During this robbery approximately $5,000 was taken. During the robbery Lapree, Falkins and I each carried handguns. Lapree was dressed as a female during the robbery. Lapree, Falkins and I each received one-third of the amount taken in the robbery. During the robbery Falkins struck one of the tellers who was employed in the bank.

"I have read the above statement and I now sign it because it is true and correct.

"/s/ Signed: Earl C. Wallace

"Witnesses:
"/s/ Charles W. Draper, SA, FBI, NOLA, 4-1-76.
"/s/ James Allen Roberts, SA, FBI, NOLA, 4-1-76"

Interviewed on 4/1/76 at New Orleans, Louisiana. File NO. 91-7204. By SA CHARLES W. DRAPER & SA JAMES ALLEN ROBERTS CWD:dbr. Date dictated 4/2/76

SUPREME COURT
OF LOUISIANA
A True Copy
JUL. 13, 1978
/s/ ANDREW J. FALCON
DEPUTY CLERK

NO 91-7204
CWD:dbr

ORLEANS PARISH CRIMINAL
SHERIFF'S OFFICE
SPECIAL INVESTIGATION DIVISION
APRIL 1, 1976.

10577202387

The following statement is taken by Deputy Joseph Howard in the Orleans Parish Criminal Sheriff's Office. Special Investigation Division on April 1, 1976, at 11:40 a.m. This statement is given by Earl C. Wallace, N/M, DOB 1/17/55. Statement is relative to his knowledge and involvement in the robbery of the Liberty Bank, located at 3202 Gentilly Boulevard on December 4, 1975.

STATEMENT

Q. Denotes questions asked by Deputy Joseph Howard.
A. Denotes questions answered by Earl C. Wallace.
Q. Mr. Wallace, it is my duty before taking this statement from you to advise you of your constitutional rights you need not make any statements, that is, you have a right to remain silent. Anything you say maybe used against you in trial. You have a right to consult with and obtain the advice of an attorney before answering any questions. If you cannot afford an attorney the Court will obtain and appoint an attorney to present and advise you. You have the right to have your attorney or appointed attorney present at the time of any questioning or giving of any statement. Do you understand what I have just read you?
A. Yes sir.
Q. Do you wish to give me a statement at this time?
A. Yes sir.
Q. What is your name and date of birth?
A. Earl C. Wallace, 1/17/55.
Q. Why are you incarcerated in Orleans Parish Prison?
A. For possession of Heroin.
Q. On December 4, 1975, the Liberty Bank, located at 3202 Gentilly Boulevard was robbed by two males and a male dressed as a woman, do you have any knowledge of this robbery?
A. Yes sir.
Q. Would you relate to me in your own words the knowledge that you have about this robbery?

A. It happened that morning that me, Jessie LaPrieur, and Floyd Fawkins had decided to rob a bank, which we had to go and steal a car. Then we had to go and dress up. Jessie LaPrieur played as the woman, me and Floyd dressed up in some old clothes and had stocking masks on our faces. We went down there to Liberty Bank and robbed the bank. Jessie LaPrieur played as the woman, Floyd was back there with Jessie La Prieur harrassing the people, while I held the people down on the floor. We shot on out of there and we got into the stolen car. We went to another house, at the time I can't replace the address; we had got talking and then got the car cleaned and sent it off somewhere else.

Q. You stated that Floyd and Jessie harrassed the people in the bank, just how did they harrass the people?

A. Floyd and Jessie ran on through there and grabbed one of the ladies. Floyd had one of the ladies and he hit one of the ladies with the pistol and hollering "Where's the money at", while I was holding the people down. Jessie Le Prieur was back there getting the money. I was hollering "Come on, Let's Go". It was dead outside. Then we shot on out there with what we had. We went on over to another pad which Jessie LePrieur had. We got outside in the car and stayed down around some apartment buildings. The Police was out there, but they couldn't find us and we shot on out. We went to split the money up and cleaned the car up and then me and Floyd caught a cab and left Jessie LePrieur at the house.

Q. Where is this house located that you went too immediately after robbing the bank?

A. I couldn't exactly tell you the address, because I don't know, but I know that when we went out we come over a bridge and come all the way around and just came to a house and parked in the back of the alley. Back there we seen Jessie LePrieur's house and we went on up in there. We divided the money and came on out. We came in a cab, me and Floyd Fawkins. Jessie LePrieur just laid there. And then he cleaned the car out.

Q. How much money was taken in the robbery?

A. About five grand.

Q. What type of weapons were used to rob the bank?

A. I had a .9 mm luger, Floyd Fawkin had a .38, and Jessie LePrieur had a .25 automatic.

Q. You stated earlier, that you went and stole a car, where did you steal this car from?

A. From around by the post office over there on Loyola.

Q. Do you remember what type of vehicle that it was that you stole?

A. I believe that it was a Chevy. A chevrolet, I am not sure.

Q. In the robbery, one of the bank guard's weapon were stolen, who has that weapon now?

A. Jessie LePrieur.

Q. What happened to the luger that you used in the robbery?

A. It was stolen.

Q. By whom?

A. A juvenile by the name of "Monday".

Q. What happened to the .38?

A. The .38, I gave to my "old Man".

Q. When you say your "old Man" who are you referring to, your father?

A. My father, but he didn't know nothing about the robbery that took place.
Q. Was he aware that you had taken the weapon?
A. No sir.
Q. Are you aware of the present location of Floyd Fawkins or Jessie LePrieur?
A. Jessie LePrieur, right now is out of town in Jail for another Armed Robbery, Bank Robbery. Floyd Fawkins, right now is on Clio and Carondelet, 1633, Apt #1.
Q. Is there anything you wish to add or delete from this statement?
A. No sir.
Q. Is this statement true and correct to the best of your knowledge?
A. Yes sir.
Q. Were you forced, threatened, or promised anything to make this statement?
A. No sir.

END OF QUESTIONS ASKED BY DEPUTY JOSEPH HOWARD.
END OF QUESTIONS ANSWERED BY EARL C. WALLACE.

/s/ EARL C. WALLACE
EARL C. WALLACE
/s/ DEPUTY JOSEPH HOWARD
DEPUTY JOSEPH HOWARD

This statement ended at approximately 12:15 p.m. on April 1, 1976 and was taped and transcribed by T. Dilley on the same date.

STATE OF LOUISIANA
PARISH OF ORLEANS

AFFIDAVIT OF HENRY V. E. MITCHELL, IV, ATTORNEY AT LAW

This affidavit made on the 25th day of March, 1977 in the offices of Phelps, Dunbar, Marks, Claverie & Sims, New Orleans, Louisiana.

Affiant, Henry V. E. Mitchell, IV, states and affirms that the following is to the best of his recollection and ability to recall the facts and circumstances surrounding his representation of one Floyd Falkins, defendant charged with armed robbery in the court of Charles Ward. On or about the last week of August or early September, 1976, affiant conversed with Sheila Meyers, District Attorney assigned to Section A of the Criminal District Court concerning the pending trial of Floyd Falkins charged with the crime of armed robbery. Affiant at that time asked Sheila Meyers for any and all information concerning the offense, the robbery of the Liberty National Bank located at 3200 Gentilly Boulevard, New Orleans, Louisiana. Affiant remembers clearly that he asked Miss Meyers if any individuals were identified by the bank personnel subsequent to the robbery. Affiant clearly recalls and remembers that Miss Meyers told him that no individuals were identified at the bank. Affiant further recalls that Miss Meyers told the affiant that she intended to use three individuals who had made identifications subsequently through police line-up procedures. Affiant did not file a formal *Brady* motion in this matter since he assumed that Miss Meyers had

told him the truth about all identifications made or through the auspices of the New Orleans Police and/or their agent.

/s/ HENRY V. E. MITCHELL, IV
HENRY V. E. MITCHELL, IV

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 25th DAY OF
March, 1977.

/s/ J. KIRBY BARRY
NOTARY PUBLIC

SUPREME COURT
OF LOUISIANA
A True Copy
JUL. 13, 1978
/s/ ANDREW J. FALCON
DEPUTY CLERK